Filed 7/27/09 P. v. Skeslien CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAYMIE KAY SKESLIEN,<br><br>Defendant and Appellant. | C057422<br><br>(Super. Ct. No. NCR5124) |

In February 2002, defendant Jamie Kay Skeslien, a 22-year-old female, engaged in consensual oral copulation with J.M., a 15-year-old female. Defendant pled no contest to violating Penal Code section 288a, subdivision (b)(2), which criminalizes oral copulation between a person over 21 years old and a person under 16 years old.[1]

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[1] Penal Code section 288a, subdivision (b)(2) states: "Except as provided in Section 288 [lewd conduct with person under 14 years of age], any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony." (Further section references are to the Penal Code, with subdivisions in parentheses immediately after the section number, e.g., section 288a(b)(2).)

Defendant was placed on probation. In September 2007, the court found defendant in violation of probation, sentenced her to state prison for two years, and imposed a mandatory sex offender registration requirement. (Former § 290(a)(1)(A) [in October 2007, the Legislature reorganized and renumbered the registration laws (Stats. 2007, ch. 579)--the mandatory lifetime registration is now in section 290(c), and a discretionary registration requirement is now in section 290.006].)

On appeal, defendant contends that section 290's mandatory sex registration requirement for violation of section 288a(b)(2) violates her right to equal protection of laws and, therefore, must be stricken. She also challenges fines imposed by the court.

We accept the People's concession that, as applied to this case, the mandatory sex offender registration requirement violates equal protection of laws. And, as we will explain, we conclude that the facts of this case do not support sex offender registration pursuant to section 290.006. Thus, we shall modify the judgment by striking the order requiring defendant to register as a sex offender for the rest of her life. We also shall modify the judgment by reducing to $200 each the restitution fines imposed pursuant to sections 1202.4 and 1202.45.

DISCUSSION

I

When defendant was sentenced to state prison in September 2007, section 290(a)(1)(A) mandated lifetime sex offender registration for persons convicted of specified offenses, including any violation of

section 288a, but not including violation of section 261.5, unlawful sexual intercourse with a minor.

Relying on the reasoning of *People v. Hofsheier* (2006) 37 Cal.4th 1185 (hereafter *Hofsheier*), and *People v. Garcia* (2008) 161 Cal.App.4th 475 (hereafter *Garcia*), defendant contends that mandatory sex offender registration for consensual oral copulation with a 15-year-old minor, but not for consensual sexual intercourse with such a minor, violates her right to equal protection of laws. The People concede that defendant's claim has merit. We accept the concession.

Hofsheier, a 22-year-old male, was convicted of oral copulation with a 16-year-old female, a violation of section 288a(b)(1)[2] and was ordered to register for life as a sex offender pursuant to former section 290(a)(1)(A). (*Hofsheier, supra,* 37 Cal.4th at p. 1192.) On appeal, Hofsheier claimed he was denied equal protection of laws because a person convicted of unlawful sexual intercourse with a minor (§ 261.5) with the same age difference was not subject to mandatory registration. (*Hofsheier, supra,* 37 Cal.4th at p. 1192.) The Supreme Court concluded that adults who committed voluntary oral copulation with 16-year-old and 17-year-old minors were equally situated with adults who commit voluntary sexual intercourse with 16-year-old and 17-year-old minors--the only distinction between the two groups being the sexual conduct, a distinction legally insufficient

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[2] Section 288a(b)(1) states: "Except as provided in Section 288 [lewd conduct with a person under 14 years of age], any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished . . . ."

to require registration of one group but not the other. (*Id.* at pp. 1200-1204.)

Garcia, aged 26, was convicted in 1985 of crimes of oral copulation and unlawful sexual intercourse with a 14-year-old female. (*Garcia, supra,* 161 Cal.App.4th at p. 478.) Because of the oral copulation conviction, Garcia was ordered to register for life as a sex offender. (*Ibid.*) After the Supreme Court's decision in *Hofsheier,* Garcia filed a motion challenging the appropriateness of the mandatory registration requirement. (*Id.* at pp. 478-479.) Relying on the reasoning of *Hofsheier*, the appellate court reversed the registration requirement: "If there is no rational reason for this disparate treatment when the victim is 16 years old, there can be no rational reason for the disparate treatment when the victim is even younger, 14 years old. Accordingly, *Hofsheier* applies whether the conviction is under subdivision (b)(2) or (b)(1) of section 288a." (*Garcia, supra,* 161 Cal.App.4th at p. 482.)

Here, the only fundamental difference between the present case and the *Hofsheier* and *Garcia* cases is that the victim and defendant are of the same gender, a difference insignificant for purposes of equal protection of laws analysis (*Hofsheier, supra*, 37 Cal.3d at p. 1199 [statutes punishing the same sexual conduct differently based on sexual orientation violate equal protection of laws). Therefore, the mandatory sex offender registration requirement is invalid.

Defendant contends that we should not remand for the trial court to consider whether to impose a registration pursuant to

former section 290(a)(2)(E) (now section 290.006), which states that a person may be required to register as a sex offender "if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. . . ." In defendant's view, remand is not appropriate because the undisputed facts show that she "demonstrated no compulsion to engage in sex acts with young girls or any need for sexual gratification."

The crime report reflects defendant was "drunk" at the time of the incident. In a statement to an investigator, the 15-year-old girl involved in the incident asserted she was "not a victim" and it was she who "took advantage of [defendant]" by initiating the contact.

At oral argument in this court, defendant's counsel asserted "there is no need to remand for any further development of the facts. The facts were fully developed [in the trial court]. We have all the facts of the offense. We have all the facts of [defendant's] probation history since committing the offense. In none of the records before the trial court [and] before this court is there any evidence that the offense was committed for purposes of sexual gratification or as a result of sexual compulsion, and there is no evidence that [defendant] has committed any similar sexual offenses or anything indicating that she would be likely to commit similar sexual offenses."

In response, counsel for the People did not dispute the aforesaid characterization of the evidence. We commend Deputy Attorney General Janet E. Neeley, a talented and experienced

prosecutor, for her integrity and professionalism in stating: "I represent the sex offender registry for the State of California. We don't want it cluttered up with people who are not predators. We want law enforcement to be able to concentrate their resources on people who do [present] a significant risk of reoffending and having other victims, and we don't want people in there who made a one-time mistake in a consensual relationship with a minor who was of this age or above, who is very unlikely -- there is a very low risk of reoffense. In fact, it is such a low risk of reoffense in the situation that [defendant] is in . . . that she can't even be scored on the state's risk assessment . . . ." When asked whether this acknowledgment would support a conclusion it would be an abuse of discretion to impose a sex offender registration requirement in this case, Ms. Neeley correctly responded: "That determination will have to be made by [this court]." We do so now.

We conclude the undisputed facts of this case do not support requiring defendant to register as a sex offender for the rest of her life pursuant to section 290.006. (See *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 78-79.)

Accordingly, for the reasons stated above, we must strike the lifetime sex offender registration requirement imposed by the trial court pursuant to the mandatory registration statute. Because there is no factual basis for the imposition of a registration requirement pursuant to section 290.006, defendant correctly contends it would be "a waste of judicial resources" to remand this matter to the trial court for a ruling on that issue.

II

When the trial court originally granted defendant probation, it imposed a $200 restitution fine pursuant to section 1202.4. When the court later revoked defendant's probation and sentenced her to state prison, it imposed restitution fines of $400 pursuant to sections 1202.4 and 1202.45.

Defendant contends, and the People properly acknowledge, this was error and the fines must be reduced to $200 each. We agree.

DISPOSITION

The judgment is modified by striking the order requiring defendant to register as a sex offender, and by reducing to $200 each the restitution fines imposed pursuant to sections 1202.4 and 1202.45. As modified, the judgment is affirmed. The trial court is directed to (1) amend the abstract of judgment to reflect these modifications, and (2) send a certified copy of the amended abstract to the California Department of Corrections and Rehabilitation.

SCOTLAND, P. J.

We concur:

BLEASE, J.

BUTZ, J.